

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Duke University,)	
)	
Employer,)	
)	
and)	Case No. 10-RC-276475
)	
Washington-Baltimore News Guild, Local 32035)	
)	
)	
Petitioner.)	
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**EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
DECISION ON CHALLENGED BALLOT**

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TABLE OF CONTENTS

Employer’s Request For Review Of The Regional Director’s Decision On Challenged Ballot	1
I. Statement Of The Case	2
II. Factual Background	3
III. Board Standards For Ineligible Temporary Employee Status Require A Finding Of Sisk’s Ineligibility.....	5
IV. Conclusion	7

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>E. F. Drew & Co.,</i> 133 NLRB 155 (1961)	5
<i>Indiana Bottled Gas Co.,</i> 128 NLRB 1441 (1960)	5
<i>Iowa Beef Packers, Inc.,</i> 144 NLRB 615 (1963)	6
<i>Marian Medical Center,</i> 339 NLRB 127 (2003)	5
<i>NLRB v. New England Lithographic Co.,</i> 589 F.2d 29 (1st Cir., 1979)	6
<i>Owens-Corning Fiberglass Corp.,</i> 140 NLRB 1323 (1963)	5
<i>Sealite, Inc.,</i> 125 NLRB 619 (1959)	5
<i>St. Thomas-St. John Cable TV,</i> 309 NLRB 712 (1992)	6
Other Authorities	
29 C.F.R. § 102.67(d)	2

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Pursuant to § 102.69(c)(2) of the Board’s Rules and Regulations, Duke University (herein “Employer”) submits this Request for Review of Regional Director Elizabeth Kerwin’s December 14, 2021 Decision on Challenged Ballots, and specifically her Decision regarding the Board “Not on List” challenge to the ballot of Christopher Drew¹ Sisk.² The Employer did not include Sisk on the Voter List because he worked as an ineligible temporary employee at the time of the eligibility date in this matter. The Regional Director, however, erroneously found uncertainty existed regarding the precise end date of Sisk’s temporary employment arrangement, and thus reached the incorrect conclusion that Sisk was an eligible voter.

¹ As reflected in the record in this matter, Mr. Sisk is known by the name “Drew.”

² The Employer does not request review regarding the Regional Director’s decisions on challenges to the ballots of Michael Cornett or Kristen Twardowski.

The Employer submits this Request for Review because: (1) a substantial question of law and policy is raised by the Regional Director's departure from officially reported Board precedent; and (2) the Regional Director's decision on substantial factual issues is clearly erroneous on the record, and these errors prejudicially affect the outcome of the election. *See* 29 C.F.R. § 102.67(d).

I. STATEMENT OF THE CASE

Pursuant to a Stipulated Election Agreement, Region 10 (Subregion 11) conducted a mail ballot election amongst Duke University Press employees beginning on June 2, 2021, and concluding (following the Region's postponement of the original stipulated ballot deadline and count date) on June 29, 2021. The first ballot count resulted in 35 "Yes" votes, 31 "No" votes, 1 void ballot, and 8 determinative challenges. The Employer then timely filed Objections to the conduct of the election. Pursuant to an Order dated July 21, 2021, the case was transferred to Region 7 for Post-Election proceedings. Region 7 subsequently conducted a post-election hearing on August 10 and 19, 2021. On October 1, 2021, the Hearing Officer issued his Report recommending, in part, that Sisk's ballot be amongst those opened and counted. On October 15, 2021, the Employer timely filed Exceptions to the Hearing Officer's Report.

Since the Employer filed its Exceptions to the Hearing Officer's Report, the Regional Director of Region 7 has issued two Orders, the latter of which is the subject of this Request for Review. First, on November 10, 2021, she ordered that 5 resolved challenged ballots be opened and counted. That open and count occurred on November 15, 2021, resulting in an updated ballot count of 36 "Yes" votes, 35 "No" votes, 1 void ballot, and 3 determinative challenges. The Regional Director's second Order issued on December 14, 2021, and found all three remaining challenged ballots, including Sisk's should be opened and counted. The Regional Director deferred ruling on the Employer's Objections until after the resolution of challenges.

Regarding Sisk, the Regional Director agreed with two of the Employer's Exceptions to the rationale applied by the Hearing Officer, but nonetheless erroneously relied upon purported uncertainty in the precise end date of Sisk's temporary arrangement. The Employer thus respectfully requests the Board to find Sisk ineligible due to his temporary employee status.

II. FACTUAL BACKGROUND

The Employer operates a University Press engaged in the production and sale of academic resources. Until mid-2020, Sisk worked for the Employer as a book designer, on a regular full-time basis. On May 26, 2020, however, (over a year prior to the election here), Sisk informed the Employer of his resignation from his permanent position, and also requested permission to work in a part-time temporary position for the remainder of 2020. (p. 5) (EX-13).³ The Employer, through Human Resources Director Bonnie Conner, in consultation with Director Dean Smith, granted and accommodated his request, setting the conclusion of his temporary position as the end of 2020. (pp. 5-6) (EX-14). In November 2020, Sisk requested to extend his temporary arrangement until June 30, 2021, and on November 12, 2020 Conner stated, "Dean has approved the extension of Drew's part-time 10 hour position through June 30, 2021." (p. 6) (EX-15) (PX-11). Sisk's employment did, in fact, conclude on June 30, 2021. (p. 6) (EX-16) (PX-12) (Tr. 226:18-20).

These facts leave no doubt that, throughout the entirety of 2021, Sisk possessed a definitive end date to his temporary arrangement of June 30, 2021, as specified in the November 12, 2020 formal approval by Smith and Conner. (p. 6). (EX-15) (PX-11). Moreover, that end date was, in

³ This Request for Review utilizes the following citation conventions: (p. __) or (pp. __) refer to page numbers of the Hearing Officer's Report; (JX-__) refers to Joint Exhibits offered and admitted into the record at hearing; (BX-__) refers to Board Exhibits offered and admitted into the record; (PX-__) refers to Petitioner Exhibits offered and admitted into the record; (EX-__) refers to Employer Exhibits offered and admitted into the record; and (Tr. __:__) refers to pages and line numbers of the Transcript of Hearing.

fact, ultimately Sisk's final day. (p. 6). Nonetheless, the Regional Director's Decision, like the underlying Hearing Officer's Report, relies upon statements of personal preference, made by an individual with no authority over Sisk's tenure, to find him eligible to vote.

The Regional Director's Decision and the Hearing Officer's Report erroneously cite, as evidence of uncertainty, statements made by Design Manager Amy Buchanan regarding her own hope that Sisk's tenure may extend further. Indeed, because the Regional Director correctly refused to rely upon other erroneous points raised in the Hearing Officer's Report, Buchanan's statements stand as the *only* basis for the Regional Director's decision on Sisk. No record evidence, however, suggests Buchanan possessed any authority over Sisk's end date. To the contrary, all the relevant evidence makes clear that approval authority for Sisk's arrangement rested solely with *Director Smith and Human Resources Director Conner*. (EX-14, 15) (PX-11) (Tr. 319:17-20).

To wit, each email seeking approval for the temporary arrangement originated from former Director of Editing, Design and Production Nancy Hoagland, and was directed to Conner and Smith. (EX-14, 15). Indeed, even one of the communications the Regional Director cites as evidence of uncertainty created by Buchanan – a November 12, 2020 email from Buchanan to Sisk informing him of approval of the June 30, 2021 end date (PX-11) – makes clear (through a “Hooray!” exclamation) that the approval came from others, not from Buchanan herself. Moreover, none of Buchanan's verbal communications described in Sisk's testimony at hearing suggest Smith or Conner ever introduced uncertainty regarding the end of Sisk's tenure. (Tr. 265:15-21).

In addition, the purported uncertainty introduced by Buchanan in June 2021 could not, as a practical matter, have actually resulted in an extension of Sisk's tenure. At the time of those

comments by Buchanan, the Employer had already hired Sisk's replacement, with a start date of July 1, 2021, and Sisk's exiting process had already commenced. (Tr. 265:15-21, 318:14-24, 319:17-320:1).

III. BOARD STANDARDS FOR INELIGIBLE TEMPORARY EMPLOYEE STATUS REQUIRE A FINDING OF SISK'S INELIGIBILITY.

The test for determining the eligibility of individuals designated as temporary employees is whether they have an "indeterminate" tenure. *Marian Medical Center*, 339 NLRB 127, 128 (2003). Where employees are employed for a set duration, or have no substantial expectancy of continued employment and are notified of this fact, such employees are excluded as temporary. *Indiana Bottled Gas Co.*, 128 NLRB 1441, 1442 n.4 (1960); *Owens-Corning Fiberglass Corp.*, 140 NLRB 1323, 1325 (1963); *Sealite, Inc.*, 125 NLRB 619, 619 (1959); *E. F. Drew & Co.*, 133 NLRB 155, 156-57 (1961).

In making this determination, the Board does not consider the existence a precise end date as a talisman, but instead examines the nature of the employee's status overall. For example, in *Indiana Bottled Gas*, the Board applied temporary status to employees employed "during the busy season – November through January or February", including some recalled during that season "over a period of 2 or 3 years [because] the record does not indicate that they were notified of any possibility of recall nor that any of them have been recalled regularly." 128 NLRB at 1442 n.4. Similarly, in *Owens-Corning Fiberglass*, the Board relied upon the fact that an employee hired from an employment referral service for an "irregular" period of time "was not told [] that his employment was to be of an indefinite nature, nor had he ever received any assurance of recall". 140 NLRB at 1325. Indeed, the case primarily relied upon in the Regional Director's Decision (at page 4 of that Decision) clarifies:

This test does not require a party contesting an employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. It is only

necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.

St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992).

Consequently, even incorrectly assuming *arguendo* Buchanan possessed authority to speak on behalf of the Employer with regard to Sisk's tenure, the Regional Director erred by relying on her statements expressing hope that Sisk's tenure would extend further. *Even if* Buchanan had successfully obtained a second extension to Sisk's temporary arrangement, such an extension would not have changed the fact that his status remained temporary. No evidence suggests *anyone* even remotely intimated that Sisk's status could convert from temporary back to permanent status, nor that he would be recalled in the future. The record is clear that Sisk converted to temporary status in 2020, and remained on such status through the election eligibility date and his separation.

Moreover, as explained above, Buchanan did not possess authority with regard to Sisk's tenure, and thus lacked the ability to create uncertainty as to whether the Employer employed him on a temporary or permanent basis.

The Regional Director further erred by relying (at page 5, n.9 of her Decision) upon a First Circuit case - *NLRB v. New England Lithographic Co.*, 589 F.2d 29 (1st Cir., 1979) - to state in conclusory fashion that the Employer's hiring of Sisk's replacement "is inapposite." As an initial matter, such reliance constitutes error because Court of Appeals decisions do not bind the Board as precedent. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963). Additionally, in *New England Lithographic*, the facts pertained to the employee's knowledge that his employer *sought* to replace him (by placing a newspaper advertisement), rather than the *actual hiring of a replacement*. 589 F.2d at 36-37. Unlike Sisk here, the First Circuit specifically relied upon the fact that the employee was never informed of temporary status, nor any specific timeframe in which his employment

would end. Here, by contrast, the Employer's hiring of Sisk's replacement, to begin employment immediately following the previously-specified (and actual) end date of Sisk's tenure, confirms the certainty inherent to his temporary status.

As a result, the Board must reverse the Regional Director's finding of eligibility regarding Sisk for multiple reasons, including: (1) Buchanan's lack of authority to create uncertainty in Sisk's temporary status; (2) the Regional Director's misapplication of Board temporary employee status standards; and (3) the overall factual circumstances confirming both Sisk's and the Employer's temporary employment intentions.

IV. CONCLUSION

Based upon the foregoing, the Employer respectfully requests that its Request for Review be granted, and that the ballot of Christopher Drew Sisk be set aside due to ineligibility.

DATED this 29th day of December, 2021.

Ogletree, Deakins, Nash, Smoak and Stewart, P.C.

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CERTIFICATE OF SERVICE

CASE NO.: 10-RC-276475

The undersigned certifies that on the 29th day of December 2021, the foregoing, **EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION ON CHALLENGED BALLOT**, was filed via electronic filing with the National Labor Relations Board and served via e-mail upon:

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